

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR
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September 27, 2000

Lou Franchimon
Business Manager
Napa-Solano Counties
Building and Construction Trades Council
2540 North Watney Way
Fairfield, CA 94533-6732

RE: Public Works Case No. 99-074
Silverado Creek Apartments
Napa Community Redevelopment Agency

Dear Mr. Franchimon:

This constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the Silverado Creek Apartments ("Project"), a low- and moderate-income housing development, is not a public work subject to the payment of prevailing wages.

The Project is situated on a 4.7-acre parcel of land purchased for \$1,500,000¹ by the Housing Authority of the City of Napa ("City Housing Authority") with tax increment funds set aside for low- and moderate-income housing ("Housing Set-Aside Revenue") by the Napa Community Redevelopment Agency ("CRA"). The developer is Silverado Creek Partners, a limited partnership of two general partner non-profit public benefit corporations, Bridge Housing Corporation and Napa Valley Community Housing Corporation, and one limited partner equity investor, Union Bank of California.

The ground lease between the City Housing Authority and the developer restricts the use of the land to the development and operation of the Project, a 102-unit multifamily residential rental property. Not less than 20 percent of the completed units must be made available to very low-income tenants. The ground lease is for a period of 58 years. Under the terms of the lease, the lessee will prepay rent for the first 18 years in the amount

¹ After the sale of the property, a dispute arose between the Housing Authority of the City of Napa and the seller over the purchase price. According to a grand jury report, the dispute was resolved through mediation.

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of \$1. For every year thereafter, the lessee will pay rent at \$1 per year.

The construction is being performed under contract between the developer and the contractor, Segue Construction. The construction has multiple funding sources, including three loans involving the County and City Housing Authorities (discussed below) and contribution from the limited partner equity investor.

One loan source is an \$8,000,000 revenue bond loan to the developer by the City Housing Authority as issuer of 1999 Series A, B and C Mortgage Revenue Bonds and by Bank of America as the private placement bond purchaser/representative. Under this arrangement, the City Housing Authority issued the bonds, sold them to Bank of America and loaned the proceeds of the sale to the developer. The developer will repay the loan with Project revenue.

In addition, there is a \$3,763,120 loan to the developer by the City Housing Authority. The term of the loan is 45 years. The loan will be repaid in annual installments commencing on June 1, 2001 from Project revenue remaining after payment of the debt service on the revenue bond loan discussed above and after payment of the Project's operating expenses.

Last, there is a \$2,000,000 loan to the developer by the Housing Authority of the County of Napa. This loan was structured in the same fashion as the City Housing Authority loan described in the preceding paragraph. The term of the loan is 45 years. This loan will also be repaid from Project revenue.

Labor Code section 1720(a) generally defines public works to mean "[c]onstruction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds" The Project is construction. It is being done under contract. The question here is whether the construction is being paid for out of public funds.

Title 8, California Code of Regulations, section 16000 defines public funds as excluding money loaned to a private entity where work is to be performed under private contract and where no portion of the work is supervised, owned, utilized or managed by an awarding body.

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Here, aside from the monetary contribution from the private limited partner, construction was paid for entirely with loans to the developer, a private entity, from the County and City Housing Authorities. The work is being performed under private contract. The developer has undertaken responsibility for the actual construction. Once construction is complete, the Project will be utilized and managed by a private non-profit affiliate of Bridge Housing Corporation. Therefore, under the definition of public funds stated above, the loaned money does not qualify as "public funds."

You raise the additional issues whether the alleged inflated purchase price of the real property on which the Project is situated and the de minimus rent under the ground lease might constitute payment of public funds for construction of the Project. The dispute over the purchase price was resolved through mediation. There is no evidence to conclude that the final amount agreed to by the parties to the sale was not equal to the fair market value of the property. Notwithstanding the dispute over the purchase price, there is no evidence to conclude that the public funds expended in the real estate transaction were used to pay for construction of the Project. Concerning the de minimus rent, the California First District Court of Appeal in *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 18 Cal.Rptr.2d 680 has held that rent forbearance does not constitute payment of public funds for construction.

Based on the foregoing, I conclude that construction of the Project was not paid for in whole or in part out of public funds. Accordingly, the Project is not a public work subject to the payment of prevailing wages.

Sincerely,



Stephen J. Smith
Director

cc: Daniel M. Curtin
Chief Deputy Director